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TECHNICAL ASSISTANCE MEMORANDUM

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Supersedes

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TO: Area Agency on Aging Directors

SUBJECT: Implementation of Consumer Direction in the Expanded In-home Services for the Elderly Program and the Community Services for the Elderly Program - - Consumer Directed In-home Services (CDIS)

I. PURPOSE and INTRODUCTION

The New York State Office for the Aging (NYSOFA) is providing Area Agencies on Aging (AAAs) the option to add consumer directed in-home services to their Expanded In-home Services for the Elderly Program (EISEP) and Community Services for the Elderly Program (CSE). Consumer direction is a service delivery model that provides consumers with more control and choice in the delivery of care they receive. Depending on the parameters established by a program, consumers may be able to select, act as employer (i.e., train, manage and dismiss their workers); choose which services to use; choose which providers or workers to hire; decide on what time of day workers will come; decide on whether to hire family members; decide whether to spend funds on items, goods and services that can assist with tasks of everyday living (e.g. appliances, home modifications); and/or some combination thereof. As described in *The Myths and Realities of Consumer Directed Services for Older Persons* “. . . The unifying force in the range of consumer-directed and consumer choice models is that individuals have the primary authority to make choices that work for them, regardless of the nature or extent of their disability or the source of payment for services.

The purpose of this Technical Assistance Memorandum (TAM) is to assist AAAs in considering, developing and implementing a consumer directed in-home services option under EISEP and CSE.

This TAM provides background to AAAs on consumer directed care, describes key features and aspects for its design in the aging network, discusses existing requirements that must be

maintained and suggests next steps for AAAs interested in pursuing the use of a consumer directed approach. For purposes of clarity, NYSOFA is naming the aging network’s consumer directed model “Consumer Directed In-home Services” (CDIS).

Where appropriate, reference is made to the Consumer Directed Personal Assistance Program (CDPAP), the existing consumer directed program for home care services under Medicaid in New York State. The CDPAP is authorized under Title 11, Article 5, §365-f of the New York State Social Services Law (see Attachment 1). For additional information see program related SDSS/SDOH documents as Attachments 2 – 8.

AAAs also may wish to review the final rules for the “Medicaid Program: Self-Directed Personal Assistance Services Program State Plan Option (Cash and Counseling)” in the Federal Register, Vol. 73, No.193, 10/3/08. While applying to Medicaid funded self-directed personal assistance services programs, these regulations may provide some useful insights on how to structure a CDIS program.

II. BACKGROUND:

A. A History of Consumer Directed Care

The philosophy and values of the Aging Network have always been consumer oriented. The Older Americans Act promotes:

Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community- based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation.
Subsection 10 of Section 101 of Title I of the Older Americans Act of 1965 as amended in 2006.

Consumer directed (CD) care has been evolving for over 25 years. In New York State, the concept of consumer direction was introduced in the late 1970s in New York City under a special arrangement between the New York State Department of Social Services (NYSDSS), the NYC Human Resources Administration (HRA) and a newly formed agency named Concepts of Independence. This program ensured that persons with disabilities who were capable of self direction would retain autonomy and control of their own care. In addition, Concepts of Independence “adjusted traditional terminology, referring to the client/patient as the consumer and the home care worker as a personal assistant instead of an aide/attendant” (Laymon, 2000, p.3).

“During the late 1980s, early 1990s, the NYSDSS began implementation of a demonstration program entitled ‘The Patient Managed Home Care Program’ ” (Laymon, 2000). In 1995, the existing statute for The Patient Managed Home Care Program was repealed and replaced with the

Consumer Directed Personal Assistance Program (CDPAP). While incorporating many components of the previous statute, it added others including the requirement that such a program be available in each district to individuals receiving home care under the Medicaid Program. In calendar year 2006, an estimated 8,615 consumers participated in CDPAP at a total cost of approximately \$231,356,023 (NYS DOH Data Mart).

One approach to improving long-term care services is called “consumer direction.” Consumer direction is based on a belief that people with disabilities should be empowered to have greater autonomy and control over what services they receive, and from whom, when and where.
Squillace, M. R. & Firman, J., 2002, p. 7

In recent years, many factors have contributed to the interest and growth in consumer directed care options across the country. Among them is the July 1999 Supreme Court decision *Olmstead v. L.C.* (HCBSRN, 2001) which requires that individuals with disabilities receive services in the most integrated, least restrictive settings to meet their individual needs and which promote choice, independence and dignity. Other factors contributing to the growth of consumer directed care include “aggressive advocacy on the part of younger people with disabilities, a growing consumer movement in health and long-term care, concerns about the costs of long-term care services, and the recent shortage of front-line workers” (Stone, 2000, p. 5). In addition, the national Cash & Counseling Demonstration Project (Cash & Counseling), the implementation of the National Family Caregiver Support Program under Title III-E of the Older Americans Act and recent U.S. Administration on Aging (AoA) Nursing Home Diversion Modernization grants have given CD service delivery models very high national visibility especially in the aging network.

B. Key Design Principles of Consumer Directed Care

In traditional home care, the type of care, number of hours and the agency that will deliver the services are all prescribed by trained agency staff through an assessment and care planning process. A licensed or certified home care provider authorizes the services provided.

Consumer directed long-term care begins with the idea that individuals with needs should be “empowered to make decisions about the care they receive, including having primary control over the nature of the services and who, when, and how the services are delivered” (Stone, 2000, p. 5). Organizations using consumer directed approaches work together with the consumer to assess their needs and develop a plan of care. The organization then develops a budget for services so that the consumer can hire workers to provide care and/or purchase other allowable and needed services, if applicable. This is done within the cost parameters of their established services budget.

While both approaches share the goals of the delivery of high quality and appropriate care, it is consumer control and choice that are the key elements of any CD system.

The field of consumer directed care is still relatively new and a variety of different program models have emerged. Because CD is a new model of care with many variations there is also considerable room for innovation, creativity and flexibility. However, a common design element among these approaches is that they all seek to engage and empower the consumer.

According to the Principles of Consumer-Directed Home and Community-Based Services (NICDLTCS, 1996, p. 3):

. . . . too often, people with disabilities and older persons are denied the ability to exercise choice and control over some of the most basic and intimate aspects of day-to-day life. For these people, the ability to manage the support services they need, either directly or through an advocate of their choice, recognizes this fact and results in a service package that reflects individual preferences and values.

There are several key design features which can help guide the development of consumer directed care (ASPEHHS, 2002; HCBSRN, 2001):

- Ability of consumers to control and direct the delivery of the home care services they receive. This principle recognizes that individual consumers are the best judges of their own needs.
- Increased range of choice of service delivery options beyond traditional home care.
- Access by consumers to appropriate information and support about their choices and options.
- Opportunity and ability for consumers to participate in both the design of services and the planning of service allocation. Choice and control are empowering for older persons and persons with disabilities.
- Potential to be introduced into almost all service environments.

In designing a consumer directed program, programs must recognize that many eligible consumers, when given a choice, may continue to select a traditional home care service delivery method. Therefore, it is important for CD programs to maintain strong linkages with traditional home care providers so that appropriate cross referrals can be made. Even though clients may choose a traditional home care arrangement, what is most important is that they are further empowered by being given the choice to decide what arrangement they feel is best for their situation. Data from the National Cash and Counseling Demonstration indicates that, when consumers are given the opportunity to make an informed choice, about 50% of eligible consumers choose a consumer directed option (Mahoney, 2005b).

C. Models of Consumer Directed Care

Consumer direction is not a single approach. It represents a concept or philosophy of care that encompasses a range of models. Consumer directed programs vary from state-to-state. Differences include type of decision making by the consumer and level of control, the autonomy possessed by the consumer and the role of home care professionals and agencies (Benjamin, 2001, p. 83).

Scala, M. A. & Mayberry, P. S. (1997, p. 8) have provided a useful approach to understanding the various models of CD programs. According to these authors, there are four basic models of consumer directed home care:

- **Direct pay/cash and counseling (CC).** This is a model of services where the consumer manages both funds and services. This approach begins with a traditional home care assessment and the development of a care plan. The next step is to assign a cash value or cost to this plan. It is this cash value that will be made available to the consumer to employ their home care workers. Consumers are then provided unbiased information (counseling) in making the decision to accept CC or traditional home care. If the choice is for CC, then counseling and other supports are provided to the consumer. Under this option, the consumer is allowed to hire anyone, including close relatives such as his/her parent or sibling. The consumer is the employer of record and controls the rate of pay, the scheduling and any benefits they may want to provide their workers. The most widely recognized example of this is the Robert Wood Johnson's Cash and Counseling Program (Mahoney, 2005b). This is a demonstration project currently operating in 15 states. (New York State is not participating at this time.)
- **Fiscal intermediary.** In this model, an intermediary agency (not the consumer) handles the benefits and paperwork of the home care workers who have been hired by the consumer. The consumer is the employer of record and hires, trains, supervises and, if necessary, fires the worker.

The NYS CDPAP is an example of a program that uses fiscal intermediaries. This model has become a very popular approach in other states as well. Examples of this type of model from other states include the Massachusetts Personal Care Assistance Program and the Vermont Attendant Services Program (Scala & Mayberry, 1997).

- **Supportive intermediary.** In this model, the role of the fiscal intermediary is enhanced beyond that noted above with tasks and activities which may include provision of help with recruitment and training of workers, case management and other supportive functions.
- **Self-directed case management/agency with choice.** In this model, the agency is the employer of record and recruits, hires, schedules and performs all of the payroll-related

functions. The consumer gives input as to preferences. The consumer interviews workers and has input into who is hired. The consumer also monitors the quality of his/her care. An example of this model can be found in the Pennsylvania Attendant Care Consumer-Directed Program.

There are also other models of consumer directed care. They include:

- **Voucher programs.** Such programs provide consumers with a voucher equal to a certain amount of money that they can use to purchase services. A primary example of this approach is the Family Support Services program operated by the NYS Office of Mental Retardation and Developmental Disabilities (OMRDD). According to OMRDD (2006), this service system is focused “on providing opportunities for people with developmental disabilities and their families, offering choice, individualized planning and services that are appropriate to meeting individual needs. Programs and services are developed in collaboration with family members, providers, government leaders, advocates and the people we serve.” The program is intended to provide the support necessary for families to care for their son or daughter at home and to keep families intact or to reunite families that have developed problems under the burden of providing care without the necessary supports. The services provided include counseling, crisis intervention, day services, environmental modifications, evaluation, intake and referral, in-home services, respite and transportation.
- **Person centered planning model (PCP).** This approach empowers the individual being assisted by involving them in the process for identifying their needs and preferences regarding service options. PCP has been pioneered by those working with persons with either mental retardation or some form of intellectual disability. “Unlike traditional planning methods, Person Centered Planning highlights the capacities, dreams, hopes and desires of the person with disabilities. Through a facilitated conversation with the person and his/her invited guests, a unique plan is developed that maps the route to a positive future” (NYSARC, 2006). Many ARCs have adopted this approach to enhance their community-based programs.

D. Potential Benefits of Consumer Directed Programs

Experience to date has shown that there can be many benefits associated with the provision of consumer directed programs. Research indicates that CD programs can provide substantial benefits for older people by allowing them to retain more choice and control over their lives at a time when many see a narrowing of their opportunities to continue to do so (Benjamin, 2001; Scala & Mayberry, 1997; Stone, 2006). Because the model primarily involves the client and the worker, consumer directed programs may also have the potential to have lower administrative costs and thus enable “a given budget to cover significantly more hours of services to more seriously disabled clients than does the agency alternative” (Doty, Benjamin, Matthias & Frank, 1999, p. 9). In addition, CD services can sometimes meet needs that traditional home care services may not be able to meet. Examples would include an ability to find workers to provide

needed care during “off hours”, such as nights and weekends, where traditional home care agencies may have difficulties meeting client needs or to have continuity of care with the same worker consistently assisting the consumer.

- **Appropriate for older persons with disabilities**, including individuals with mild cognitive impairments, through the use of representatives (see page 8 for a description of a “representative”). In addition, older consumers are often very interested in directing their own care (Squillance and Firman, 2002).
- **Cost effectiveness.** Consumer directed programs can be a cost-effective way to deliver home care services to older persons and the disabled in the 27 states that have implemented this option (HCBSRN, 2001, p. 11). In these states, it has helped to provide more cost effective home care and community based services.
- **Positive impact on family caregivers.** Supporting caregivers is critical to our system of long term care. While the number of functionally impaired elderly is growing, the number of informal supports is shrinking. Our current long term care system relies heavily on family members and other caregivers who provide 80% of long term care services. Consumer directed approaches can help sustain and support friends and family members in their caregiving roles without reducing the number of service tasks these caregivers provide without pay (Benjamin & Matthias, 2004).

Research indicates that CD programs have a positive impact on family caregivers (Doty, 2004; Feinnberg & Ellano, 2000). Such programs maximize family involvement in service planning and respect the preferences and values of both the consumer and his or her family members. Also, in a consumer directed option, informal caregivers may help an elder select and train an in-home service worker, function as a representative for these decisions and tasks and/or receive payment for providing at least some of the care.

- **Shortage of home care workers.** There is a well documented shortage of traditional homecare workers across the nation (Wilner, 2000). Many AAAs have also noted aide shortages which have impacted their ability to meet local needs. Consumer directed programs directly address the shortage of traditional home care workers by creating a new and untapped pool of in-home workers (e.g., family, friends, and neighbors) to supplement the existing traditional agency provided home care workforce.

III. Implementing the Consumer Directed In-home Services Option for EISEP and CSE funded EISEP-like In-Home Services

As noted earlier, the consumer directed approach fits well within the philosophy that has guided the development of AAAs since their inception -- to improve the quality of life of older people while allowing them to maintain their independence. While the aging network has always been consumer focused and operated in a manner that considered consumer preferences, consumer

direction takes the network one step further by moving from a consumer-oriented system to one that is consumer directed.

The CDIS approach can be implemented as a complementary option to the standard home care services provided by AAAs through licensed and certified home care agencies funded through EISEP and CSE for EISEP-like in-home service. Under CDIS, self-directing consumers or their representatives may hire, dismiss, train and supervise their in-home service worker.

Utilization of the CDIS approach represents a significant change in responsibilities for the consumer or their representative, the case manager, the provider agency (ies), and the area agency on aging. Implementation of CDIS is a major change in program design and operating philosophy and will require significant effort to plan and implement. All AAAs should carefully consider how the CDIS approach can be integrated into their existing service delivery system and benefit those they serve.

A. Program Design

1. Who is eligible for CDIS?

The consumers of CDIS must meet the following criteria:

- Eligible for or receiving EISEP or CSE funded EISEP-like in-home services; and
- Able to make informed choices and to implement, with or without assistance, those choices in regard to services to meet their needs; and
- Able to understand the consequences of their choices and be willing to take responsibility for them.

A consumer who has a legal guardian with the authority to make care decisions may participate.

A consumer may designate a “representative” to assist them. It may be a family member or another individual who is at least 18 years old, who is able and willing to help the consumer make and implement informed choices, and has been designated in writing by the consumer to be his or her representative.

2. Who provides the care?

Care is provided by an In-home Services Worker who is recruited, hired, trained, supervised and, when necessary, dismissed by the consumer or their representative. Because In-home Services Workers are trained by the consumer or their representative, they are not required to have successfully completed an approved training program. The assistance provided by the worker is in accordance with the care plan developed by the

case manager with the consumer or their representative, based on an assessment of overall needs.

3. Who can be an In-home Services Worker and what tasks can they perform?

The In-home Services Worker must be at least 18 years old and either be a U.S. Citizen or demonstrate authorization to work legally in the United States. The In-home Services Worker may be a family member, neighbor, friend or someone not previously known to the consumer who was identified during the recruitment process.

In-home Services Workers must meet the same health requirements as those for direct care staff in licensed home care services agencies and certified home health agencies. This means that the following criteria must be met: (1) their health status is assessed annually, or more frequently if necessary; (2) they are free from health impairments which would be of potential risk to the consumer or which might interfere with the performance of his/her duties; and (3) they have met and continue to meet the requirements in regards to immunizations for rubella and measles, and a ppd (Mantoux) skin test for tuberculosis (see Appendix, item #7 for the SDOH regulations, §766.11, regarding health status and assessments, and required immunizations and tests and maintenance of records).

There are three limitations as to who may not be an In-home Services Worker:

- He or she cannot be functioning as a representative for the consumer;
- He or she cannot be someone who has legal or financial responsibility for the consumer (i.e. spouse, conservator, guardian, power of attorney, protective payee, representative payee); or
- He or she cannot be a person who is known to have been convicted of Medicaid fraud or elder abuse.

4. Can criminal background checks be performed?

Background checks are encouraged but not required. This is a decision made solely by the consumer or their representative. In many instances, the consumer or their representative will know the history and background of the In-home Services Worker under consideration and, because of this knowledge, will choose not to conduct a check. However, the literature does note that such a criminal background check affords the consumer or their representative “some protection against hiring a worker who is negligent or dishonest or who is likely to abuse or neglect the consumer” (Sabatino & Hughes, 2004, 133). Thus, there may be instances when the consumer or their representative will want to conduct a criminal background check, even though the consumer or their representative has an established relationship with the potential In-

home Services Worker. In situations where the potential In-home Services Worker's background and history are not known to the consumer or their representative, the consumer or their representative may also want to ask for references in addition to conducting a criminal background check. The consumer or their representative uses the information provided by the check as he/she determines appropriate in the hiring process. The impact this information has on the hiring decision is determined by the consumer or their representative except in two instances. If the background check indicates that the person has been convicted of Medicaid fraud or elder abuse, he/she may not be hired by the consumer or their representative.

A consumer or their representative should always be informed that he/she may choose to conduct a background check on a potential In-home Services Worker and should be assisted in requesting the criminal background check to the extent such is needed. A consumer or their representative may obtain data covering all 62 counties within New York State pertaining to convictions and open/pending cases originating from city and county courts by contacting the New York State Office of Court Administration. The fee is currently \$52.00. Further information, including a copy of the application is available on their website at www.nycourts.gov/apps/chrs/. A more extensive check can be done, but only by the potential In-home Services Worker, by contacting the Division of Criminal Justice Services (DCJS). The potential worker can obtain all criminal history information maintained by the Division, pertaining to himself or herself, including arrests and convictions within New York State, by requesting a Record Review Packet. A fingerprint card will also need to be submitted, and there is currently a \$50 fee. Further information, including a copy of the application, is available on their website at www.criminaljustice.state.ny.us/ojis/recordreview.htm. In order to obtain out-of-state criminal history data, a potential In-home Services Worker may request a copy of his or her own Federal Bureau of Investigation (FBI) identification record. This record provides certain information taken from fingerprints and submissions, retained by the FBI, in connection with arrests, and in some instances, federal employment, naturalization, or military service. A fingerprint card would need to be submitted by the potential worker. The fee is currently \$18.00. Further information, including a copy of the application, is available on their website at www.fbi.gov/hq/cjisd/fprequest.htm. It is important to emphasize that the consumer or their representative cannot obtain background information on the potential worker from DCJS or the FBI. The potential worker must request the information and then share it with the consumer or their representative.

EISEP would cover the fees of the background checks described above. Costs of additional background checks and/or hiring a private investigator are not a covered expense under EISEP.

A consumer or their representative who has chosen to request a criminal background check on a potential In-home Services Worker has the choice of employing the person while awaiting the results of the check or waiting until the check is complete and she/he has received the results.

While performing a criminal background check reduces potential harm to the consumer or their representative, it is not a guarantee against criminal conduct. It is important for the consumer or their representative to understand that as the employer/supervisor of the In-home Services Worker, the consumer or their representative assumes all responsibilities, risks and liabilities in connection with employing the worker including any bodily injury, property damage or loss sustained by the consumer, their representative or to the In-Home Services Worker. This is also the case regardless of whether a criminal background check is performed or if the information disclosed by the background check is used.

5. Who can an AAA contract with to perform the employment and record- keeping functions?

AAAs choosing to offer CDIS as an option must either contract with a fiscal intermediary or function as the fiscal intermediary itself. AAAs may contract with any agency in the community it determines can adequately perform the required fiscal intermediary functions and any additional functions they may require the fiscal intermediary to perform in order to support the consumer or their representative in their employer related functions. These include, but are not limited to:

- Licensed home care services agencies (LHCSAs) as long as they do so as a business separate from their business as LHCSAs. Some have developed such businesses and are currently fiscal intermediaries under CDPAP.
- Existing providers of the Consumer Directed Personal Assistance Program. If an AAA contracts with an entity functioning as the fiscal intermediary in the CDPAP it will be important to maintain a separation between the CDIS option implemented by the aging network and the CDPAP under Medicaid.
- Other entities in the community, for example private payroll and benefit administration companies, who can perform the fiscal intermediary functions as required by the AAA.

6. What is the division of responsibility?

It is critical that the roles and responsibilities of each party be clearly defined and articulated; that the consumer or their representative, case manager and provider agency responsibilities be discussed and provided in writing to ensure that they are understood by all parties and are available for reference; and that each is reviewed periodically to ensure accuracy and understanding.

- **Consumers or their Representatives.** As noted, consumers or their representatives are the employers and the supervisors of the In-home Services

Worker and are responsible for the recruiting, interviewing, hiring, training, supervising and scheduling the In-home Services Worker who will provide the direct care pursuant to the care plan that has been developed with the case manager. The consumer or their representative may dismiss the In-home Services Worker at their discretion. They must also schedule substitute workers when the regular In-home Services Worker is absent. They must process all the paperwork, e.g. submit time sheets, time off request forms, required by the fiscal intermediary agency that they are working with. As both the employer and supervisor of the In-home Services Worker, the consumer or their representative assumes all responsibilities, risks and liabilities in connection with employing the In-home Services Worker, including any bodily injury, property damage or loss sustained by the consumer, their representative or In-home Services Worker. Additionally, the consumer or their representative is subject to all applicable federal and state laws, rules and regulations governing employer conduct.

In those instances where there is a representative, the care plan that is developed must clearly describe the role and responsibilities of that person, including the amount and frequency of contact he/she will have with the consumer and the In-home Services Worker, as well as the role and any responsibilities remaining with the consumer.

- **Case manager/case management agency.** The case manager/case management agency, after consultation with the consumer or their representative, makes the decision as to whether a consumer is appropriate or continues to be appropriate for the CDIS option. The case manager is responsible for performing all the usual case management functions including assessment, reassessment, care plan development, service authorization and referrals and service follow-up and client monitoring.

The care plan is developed by the case manager with the consumer or their representative. As part of care planning and ongoing client monitoring, the case manager working with the consumer or their representative and fiscal intermediary, identifies if any assistance is needed and available to help the consumer or their representative successfully fulfill his/her role and responsibilities, and provides support to the consumer or their representative as they take the action necessary to successfully implement and manage their in-home services.

With the exception of the in-home services, the case manager continues to manage the other services the consumer is receiving. Regarding the in-home services, the case manager may be mentoring the consumer or their representative or acting in another supportive role depending on the needs and requests of the consumer or their representative. The case manager will not act in place of the

consumer or their representative, but rather in a position that supports the consumer or their representative as he/she performs his/her responsibilities.

Because of the case manager's knowledge and skills, his/her relationship with the consumer and his/her understanding of the consumer and his/her circumstance, the role of the case manager continues to be a critical one. It is an ongoing role and one that encompasses different functions at different times and may change over time.

- **Fiscal Intermediary.** The agency performing employment and record keeping functions must perform certain administrative functions including:
 - Processing payroll for the In-home Services Worker including all withholding and Social Security taxes, insurance, unemployment and workers' compensation benefits;
 - Coordinating any fringe benefits, such as health insurance or annual leave, and ensuring the completion of annual worker health assessments;
 - Maintaining all required employment documents;
 - Ensuring that all agreements are followed;
 - Maintaining personnel records for all In-home Services Workers including the required documentation regarding the health assessments, immunizations and tests;
 - Reporting to and meeting with AAA staff as may be required; and
 - Billing the AAA and the consumer or their representative, if he/she is required to cost share and this is the responsibility of the agency.

The fiscal intermediary agencies may also perform other tasks based on the needs of the consumer or representative in conjunction with the case management agency as per the agreement with the AAA. These tasks may include varying types and levels of support and assistance to a consumer or their representative as they carry out their employer and personnel management related responsibilities, e.g., recruitment, hiring/firing, training, supervising and scheduling their In-home Services Worker. For example, an agency may provide guidance and/or training to the consumer or their representative in the areas of supervision and training of the In-home Services Worker. They may also make suggestions in the areas of recruiting and interviewing prospective In-home Services Workers.

When first entering the program, a consumer or their representative may need more assistance in carrying out their responsibilities. Once some initial support is provided, a consumer or their representative may occasionally need additional guidance. For example, initially a consumer may have many questions about conducting an interview – where to conduct it, what questions to ask, who else should be involved and how to check references -- because they have never done this before or perhaps not for a long time. However, once the consumer receives information to address their questions and actually conducts an interview or two, they usually don't need the same level of assistance thereafter. They have gained knowledge, skills and experience to apply to the next interview or set of interviews. The degree of help available from a fiscal intermediary will vary from agency to agency. The AAA must decide what types of assistance will be available, to what extent this assistance will be provided, and by whom.

- **In-home Services Workers.** In-home Services Workers are hired, trained and supervised by the consumer or their representative. The worker is responsible for recognizing the authority of the consumer or their representative as employer and carrying out the agreed to tasks in the manner directed, respecting the privacy of the consumer and following the requirements and regulations of the responsible CDIS agency.

7. How does quality assurance factor into CDIS?

It is important to factor quality assurance into the development of the CDIS program. In fact, Applebaum and others strongly believe that building quality into the program from the first day of planning and improving quality assurance through an ongoing system of quality management is vital for the development of a successful program. Applebaum and his colleagues (2004) have identified four dimensions of quality:

- **Independence, autonomy, choice and control.** Consumers are able to have things done their own way. “I have no choice” is no longer a phrase that will be used by consumers or their representative to describe their satisfaction or dissatisfaction with the services being provided.
- **Relationships.** In the majority of cases, consumers will not be cared for by workers assigned by agency staff over which they have little supervisory authority. A consumer or their representative can help to maintain quality by hiring someone they trust.
- **Knowledge and support.** Consumers or their representatives will have more training and will be able to have services provided based on their preferences.
- **Health, safety and accountability.** Consumers will have a stronger role in both their own services and safety.

Quality Assurance systems in the arena of consumer directed programs are still evolving. However the manual “A Guide to Quality in Consumer Directed Services” by Applebaum and others (2004) offers many techniques for maintaining and improving program quality. The manual discusses ideas for integrating consumer feedback in the design, implementation, and monitoring phases of consumer directed programs. AAAs and their local program contractors should consider what approaches are most practical and productive in designing a local consumer directed project. For example, they may wish to consider having consumers or their representatives review and comment on program materials before they are released or provide feedback on the timeliness of program approvals to allow them to begin self direction. AAAs will want to consider what kind of consumer complaint system will be used in their program, if it will include a hotline and how it will respond to issues of abuse or neglect. Also, the AAA will need to decide how the program will monitor attainment of participant care plan goals and the type of consumer satisfaction survey the program will use.

B. Current Program Requirements and Policies

1. Provision of Case Management under EISEP or CSE. EISEP or CSE clients participating in a consumer directed services delivery model must continue to receive case management meeting the EISEP requirements. This means a NYSOFA required MDS-compliant assessment/reassessment will be conducted and a care plan developed with the consumer or their representative. It is during care planning that the consumer direction option is discussed with the consumer or their representative, if the case manager determines it is appropriate and the consumer’s decision is ascertained. Services will be authorized by the case manager by notifying the fiscal intermediary. The case manager will also continue to make arrangements and referrals for other services such as home delivered meals, social adult day care and transportation as identified in the care plan. The case manager will continue to follow-up and monitor the client and aspects of service delivery. However, it will be different when it comes to the home care services since the consumer is directing the care. In this situation, the case manager takes on a different role that is one of assisting the consumer or their representative in evaluating the quality of the service and identifying and resolving any issues. In some ways the case manager is functioning as a consultant to the consumer or their representative.

Services to be provided through CDIS will be included in the care plan. The services will be identified as consumer directed home care and the number of hours of care per week noted. If someone other than the consumer (i.e., their representative) is directing the care, this would also be noted with the necessary identifying information. In the client record it must be clear which specific tasks will be addressed. The case manager should carefully review with the consumer or their representative the tasks to be provided through the CDIS and the responsibilities of the consumer or their representative, the fiscal intermediary, and the worker.

2. Subcontracts. Since CDIS is considered a model for delivering services, an AAA must comply with the existing requirements. This means that unless an AAA meets the exception criteria for direct service delivery, the AAA must subcontract with an agency to carry out the fiscal intermediary functions.

In regard to oversight activities, AAAs must apply existing monitoring requirements to fiscal intermediary subcontractors. However, since these are minimum requirements and this is a new way of providing home care services, the AAA should supplement these minimum requirements with additional contacts with the subcontractor on a regular basis at least during the first 6-12 months of program operations.

3. Reimbursement Rates under EISEP and CSE. The Medicaid Rate Cap Policy applies when EISEP or CSE funds are used to pay for consumer directed in-home services. Therefore, an AAA may pay no more than the amount paid under CDPAP when the same agency is under subcontract to perform the fiscal intermediary functions under CDIS. AAAs may have an opportunity to negotiate rates that are lower than the approved Medicaid rates because of the more limited scope of practice under CDIS. If an AAA contracts with an entity in the community to perform these functions that does not have an approved Medicaid rate(s) for consumer direction, then the AAA may pay no higher than the highest rate(s) paid to an agency in the county for consumer direction.

The New York State Department of Health (SDOH) Medicaid personal care rate sheets NYSOFA disseminates to AAAs includes the Medicaid personal care rates for the CDPAP program. The “Consumer Directed” column should be used as the maximum allowable rate under CDIS.

4. Tasks performed. Under CDIS, In-home Service Workers may only perform tasks allowable under personal care levels I and II. This means that, unlike in CDPAP, the tasks that may be performed on behalf of and under the direction of the consumer or their representative cannot extend to activities that are generally beyond the scope of personal care level II. Therefore, home health aide and skilled nursing tasks may not be performed.

5. Cost Sharing and Contributions under EISEP and CSE. The cost sharing and contribution requirements under EISEP and CSE for EISEP-like services remain unchanged. They apply in this service delivery model as they do under the traditional service delivery model.

IV. Next Steps for Area Agencies on Aging

Initial undertaking of a consumer directed component is a major system development activity and will require considerable time and effort for planning, development and implementation. The suggested efforts to gather and review program materials that follow are a way for interested

AAAs to gain information and knowledge that will help as they begin to design a consumer directed in-home services component in their programs.

The following are some next steps for those AAAs that are considering adding such a component under EISEP and CSE. Many of these steps entail actions to help you learn more about the CDPAP program in your county and those nearby. Since the Medicaid-funded CDPAP is a major consumer directed program operating throughout New York, an AAA may choose to maximize what has been learned by CDPAP providers, while designing an aging network version of consumer direction, CDIS. More information about CDPAP is found in the attachments.

A. Meet with staff of the Local Department of Social Services to learn about the CDPAP in the county.

AAAs should learn how the program operates in the county, including reviewing materials they have produced and procedures they have developed, finding out about the local contracts they have for the program and what their experiences have been with these providers, and getting any suggestions or ideas as the AAA begins to plan for a consumer directed program.

B. Meet with the Consumer Directed provider agencies in the county and region to get their perspective on consumer direction.

This could include CDPAP providers within the county and in neighboring counties. This could also include meeting with providers of consumer directed care in the developmental disabilities (DD) service delivery system which is very different from the CDPAP and CDIS model. AAAs should ask these agencies about their experience working with the elderly. Similarly, the AAA should explain what it is they do, describing its programs (focusing on EISEP and CSE as appropriate) and the individuals that the programs target/serve. The AAA should distinguish its efforts to implement CDIS from the CDPAP under Medicaid. This is the time to begin to determine if any provider of consumer directed care is interested in serving an AAA's consumers and if the AAA is interested in contracting with them.

C. Gather any materials that are available that describe the CDPAP and/or consumer directed models in the DD service delivery system in the county or are used in/by the program.

This may include such things as program brochures, manuals and handbooks for the consumer or their representative, manuals and handbooks for the worker and agency/consumer agreements. There also may be supplemental materials that are available on an as needed basis to support either the consumer or their representative or the worker as they undertake their responsibilities and perform their functions (e.g., recruitment, interviewing, and supervision for the consumer and techniques for assisting a person with various personal care tasks for the worker).

This effort will help the AAA to better understand these other models as they currently operate in the county. Further, AAAs should read this information carefully and recognize that local

programs must comply with the authorizing statute, guidance and other documents issued by SDOH and regulations for personal care (Social Services regulations, §505.14). Note: locally

designed CDPAP materials, especially those developed by the fiscal intermediary, may not be state approved and may not be consistent with State CDPAP policy.

This is the time to begin to consider what informational and education-related materials and activities will be needed by consumers. Any CDIS materials developed for by the AAA subcontractors should be reviewed and prior approved by the AAA to assure accuracy, consistency and clarity.

D. Contracting requirements.

To assist in developing the subcontract, an AAA may wish to look at the contract(s) utilized by the local department of social services and the model CDPAP contract included in the attachment. AAAs should consult with their legal counsel as needed.

E. Administrative practices for CDPAP differ from county to county.

An AAA may also want to learn about the program in other nearby counties to get a more complete view of the program, how it operates and its variations. This will help the AAA to design its program and identify the possible roles and functions of the various partners.

F. The role of other entities/organizations.

As noted above, the AAA will be working to gain full understanding and knowledge of what is occurring in CDPAP and other consumer directed programs in the county and surrounding counties. During this time of learning and exploration, the AAA may also want to consider other program design and implementation options that could include the use of other entities to perform the fiscal intermediary function, for example a payroll and personnel management agency, or other entities for providing support/assistance to the consumer or their representative in performing their employer related functions, for example an independent living center.

G. Decide the extent to which you would like to implement CDIS.

Consider starting small to ease the learning and any mid-course adjustments that will need to be made. Think in terms of beginning with a few, carefully selected consumers who fit well within the concept of what the AAA wants to develop as an important option for older persons served. While an AAA may want to consider such things as access to and availability of traditional service delivery methods, consumer direction is not for everyone and should not be considered the answer to all problems in the current environment.

H. Don't think of a consumer directed component as an all-or-nothing approach to client services.

Consumer direction can interface with traditional home care services. That is, it is possible to think in terms of meeting some of a consumer's needs through home care provided in the traditional way while other needs, such as those during nights and weekends, could be met using the consumer directed service delivery model.

I. Consumer representation.

Consider inviting one or more consumers to participate in a workgroup to help with the planning and implementation of CDIS. An AAA may also want to consider adding a consumer(s) of CDIS to their Advisory Council for their perspective and input.

V. Conclusion

Consumer direction and the CDIS option in particular, is an additional tool for AAAs to use in bolstering their local service delivery system. It is not intended to replace existing service delivery methods but rather to expand and improve upon those services currently available. By incorporating the CDIS model into existing programs, an AAA can enhance its ability to address the diverse needs and preferences of older persons and their caregivers.

Any AAA intending to implement consumer directed in-home services should inform their NYSOFA Aging Services Representative of this decision. A plan modification will be required and a budget modification also may be needed per 05-PI-09.

If you have questions or comments, please contact Andrea Hoffman at (518) 474-0484 or Ruth Ann Standstedt at (518) 474-1357.

VI. Acknowledgement

This TAM was developed for the New York State Office for the Aging through a contract with GoldenLane Associates, Inc. The members of the project team responsible for the writing and development of this TAM were William Lane, Ph.D., GoldenLane Associates, Inc. and Marcus Harazin, Andrea Hoffman and Ruth Ann Sandstedt, New York State Office for the Aging.

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PROGRAMS AFFECTED:

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|---|--|---|---------------------------------|---------------------------------|
| <input type="checkbox"/> Title III-B | <input type="checkbox"/> Title III-C-1 | <input type="checkbox"/> Title III-C-2 | | |
| <input type="checkbox"/> Title III-D | <input type="checkbox"/> Title III-E | <input checked="" type="checkbox"/> CSE | <input type="checkbox"/> SNAP | <input type="checkbox"/> Energy |
| <input checked="" type="checkbox"/> EISEP | <input type="checkbox"/> NSIP | <input type="checkbox"/> Title V | <input type="checkbox"/> HIICAP | <input type="checkbox"/> LTCOP |
| <input type="checkbox"/> Other: | | | | |

CONTACT PERSON: Andrea Hoffman

TELEPHONE: 518-474-0484

Chapter 55 of the New York State Consolidated Laws - Social Services Law Article 5 Title 11 Section 365-f. Consumer directed personal assistance program.

1. Purpose and intent. The consumer directed personal assistance program is intended to permit chronically ill and/or physically disabled individuals receiving home care services under the medical assistance program greater flexibility and freedom of choice in obtaining such services. The department shall, upon request of a social services district or group of districts, provide technical assistance and such other assistance as may be necessary to assist such districts in assuring access to the program.

2. Eligibility. All eligible individuals receiving home care shall be provided notice of the availability of the program and shall have the opportunity to apply for participation in the program. On or before October first, nineteen hundred ninety-six each social services district shall file an implementation plan with the commissioner of the department of health. An "eligible individual", for purposes of this section is a person who:

(a) is eligible for long term care and services provided by a certified home health agency, long term home health care program or AIDS home care program authorized pursuant to article thirty-six of the public health law, or is eligible for personal care services provided pursuant to this article;

(b) is eligible for medical assistance;

(c) has been determined by the social services district, pursuant to an assessment of the person's appropriateness for the program, conducted with an appropriate long term home health care program, a certified home health agency, or an AIDS home care program or pursuant to the personal care program, as being in need of home care services or private duty nursing and is able and willing or has a legal guardian able and willing to make informed choices, or has designated a relative or other adult who is able and willing to assist in making informed choices, as to the type and quality of services, including but not limited to such services as nursing care, personal care, transportation and respite services; and

(d) meets such other criteria, as may be established by the commissioner, which are necessary to effectively implement the objectives of this section.

3. Division of responsibilities. Eligible individuals who elect to participate in the program assume the responsibility for services under such program as mutually agreed to by the eligible individual and provider and as documented in the eligible individual's record. Such individuals shall be assisted as appropriate with service coverage, supervision, advocacy, and management. Providers shall not be liable for fulfillment of responsibilities agreed to be undertaken by the eligible individual. This subdivision, however, shall not diminish the participating provider's liability for failure to exercise reasonable care in properly carrying out its responsibilities under this program, which shall include monitoring such individual's continuing ability to fulfill those responsibilities documented in his or her records. Failure of the individual to carry out his or her agreed to responsibilities may be considered in determining such individual's continued appropriateness for the program.

4. Participating providers. All agencies or individuals who meet the qualifications to provide home health, personal care, or nursing services and who elect to provide such services to persons receiving medical assistance may participate in the program. Any agency or individuals providing services under a patient managed home care program authorized under the former section thirty-six hundred twenty-two of the public health law or the former sections three hundred sixty-five-f of this chapter may continue to provide such services under this section.

5. Waivers, regulation and effectiveness.

(a) The commissioner may, subject to the approval of the director of the budget, file for such federal waivers as may be needed for the implementation of the program.

(b) Notwithstanding any other provision of law, the commissioner is authorized to waive any provision of section three hundred sixty-seven-b of this title related to payment and may promulgate regulations necessary to carry out the objectives of the program, and which describe the responsibilities of the eligible individuals in arranging and paying for services and the protections assured such individuals if they are unable or no longer desire to continue in the program.

6. This section shall be effective if, to the extent that, and as long as, federal financial participation is available for expenditures incurred under this section.

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| LOCAL COMMISSIONERS MEMORANDUM |
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DSS-4037EL (Rev. 9/89)

Transmittal No: 95 LCM-102

Date: September 18, 1995

Division: Health and Long
Term Care

TO: Local District Commissioners

SUBJECT: Consumer Directed Personal Assistance Program (CDPAP)

ATTACHMENTS: Sample Memorandum of Understanding (MOU)
(on-line)

As enacted in Section 77 of Chapter 81 of the Laws of 1995, Section 365-f of the Social Service Law was repealed and a new Section 365-f has been added to change the program name from Patient Managed Home Care to Consumer Directed Personal Assistance Program (CDPAP). The statute incorporates many of the components found in previous statutes, including Chapter 795 of the Laws of 1992 which was transmitted to the districts in 93 LCM-113.

In addition, Section 91 of Chapter 81 of the Laws of 1995 added a new Section 367-p to the Social Services Law. This Section states that "...each local district shall ensure access to a consumer directed personal assistance program operated pursuant to section three hundred sixty-five-f of this title is available in the district to allow persons receiving home care pursuant to this title to directly arrange and pay for such care."

The purpose of CDPAP is to allow chronically ill and/or physically disabled individuals receiving home care services under the Medical Assistance program greater flexibility and freedom of choice in obtaining such services while reducing administrative costs.

All agencies or individuals who meet the qualifications to provide home health, personal care or nursing services and who elect to provide such services to persons receiving Medical Assistance, may participate in the

program. Agencies or individuals providing services under a Patient Managed Home Care program, the former Section 3622 of the Public Health Law or the former Section 365-f of the Social Services Law, may continue to provide services under the CDPAP.

Eligible individuals currently in receipt of home care services will be advised of program guidelines by their local department of social services, and may apply for participation. According to Section 77 of Chapter 81 of the Laws of 1995, "an eligible individual, for purposes of this section is a person who:

- (a) is eligible for long term care and services provided by a certified home health agency, long term home health care program or AIDS home care program authorized pursuant to article thirty-six of the public health law, or is eligible for personal care services pursuant to this article;
- (b) is eligible for medical assistance;
- (c) has been determined by the social services district, pursuant to an assessment of the person's appropriateness for the program, conducted with an appropriate long term home health care program, a certified home health agency, or an AIDS home care program or pursuant to the personal care program, as being in need of home care services or private duty nursing and is able and willing or has a legal guardian able and willing to make informed choices, or has designated a relative or other adult who is able and willing to assist in making informed choices, as to the type and quality of services, including but not limited to such services as nursing care, personal care, transportation and respite services; and
- (d) meets such other criteria, as may be established by the commissioner, which are necessary to effectively implement the objectives of this section."

Eligible individuals who elect to participate in CDPAP assume the responsibility for services under the program as mutually agreed to by the eligible individual and the provider as documented in the individual's record. Such responsibilities may include:

- 1. Recruit workers
- 2. Hire workers
- 3. Train workers
- 4. Supervise workers
- 5. Fire workers
- 6. Arrange for back-up coverage when necessary
- 7. Arrange/coordinate provision of other services

8. Maintain records for processing of payroll and benefits.

Providers shall not be liable for fulfillment of responsibilities agreed to be undertaken by individuals participating in CDPAP. This does not, however, diminish the provider's liability for failure to exercise reasonable care in properly carrying out its responsibilities under this program. Such responsibilities include monitoring the individual's continuing ability to fulfill those responsibilities documented in his or her record. An individual's failure to carry out the agreed responsibilities may be considered in determining that person's continued appropriateness for the program.

Social services districts which have implemented, or initiated action to implement, a CDPAP should continue those efforts. Other districts should begin developing programs based upon the information contained in this transmittal.

Two possible methods of implementing CDPAP are:

1. Memorandum of Understanding (MOU)

Districts that have identified an immediate demand for the CDPAP delivery arrangement can use this administrative mechanism to quickly establish a program by using an established CDPAP. Six districts are pursuing this approach with Concepts for Independence, a New York City based CDPA provider. A sample of an MOU used by these districts is attached to this transmittal.

The MOU is a legal document which details the roles and responsibilities of the entities that would administer the CDPAP. These entities would include the following:

- a. the district which would conduct an assessment of the consumer to determine appropriateness for the program and authorize services;
- b. an existing CDPAP provider to act as a fiscal agent to bill the Medical Assistance program and perform administrative functions such as payroll processing at the direction of the consumer; and
- c. a third party such as an independent living center located in the district, to act as a liaison between the CDPAP provider and the consumer.

- 2) Locally Established Program

The district enters directly into a contract with a vendor to provide the CDPAP. The contract between the district and the vendor should include a delineation of the roles and responsibilities of the district, vendor and consumer.

Date September 18, 1995

Trans. No. 95 LCM-102

Page No. 4

The Department will convene an advisory group to assist in developing regulations for CDPAP. Regulations and an administrative directive will be issued as a part of this effort.

Districts are requested to contact Ms. Deirdre Barnes at (212) 383-1431 (user ID AV0060) or Mr. Fred Waite at (518) 473-5490 (user ID 0LT150) for further information concerning CDPAP or to pursue either of the options described above.

Richard T. Cody
Deputy Commissioner
Division of Health and Long Term Care

SAMPLE

MEMORANDUM OF UNDERSTANDING

for provision of the

Consumer Directed Personal Assistance Program (CDPAP)

by and between

Local Department of Social Services

and

CDPAP Provider Agency

and

Local Consumer Organization

Introduction

In accordance with Sections 365-f and 367-p(c) of the Social Services Law, the parties seek to enable Medicaid recipients (the "Consumer") to utilize the Consumer Directed Personal Assistance Program (CDPAP). The CDPAP Provider Agency will provide services in conjunction with the Local Consumer Organization for the Local Department of Social Services.

The CDPAP Provider Agency will assume the role of fiscal intermediary and act as the paymaster of record for the Consumer's Personal Assistant (the "CDPA"). The Local Consumer Organization will provide local assistance, quality assurance and facilitate peer support, including the establishment of an advisory committee for the purpose of program review and support. The CDPAP Provider Agency and the Local Consumer Organization will work closely with the Local Department of Social Services in all phases of the delivery of CDPAP to be provided under this agreement.

Although the Consumer is not a party to this agreement, the Consumer will be required to execute a separate agreement confirming his/her responsibilities as enumerated below.

The parties hereby agree as follows:

Responsibilities of the Consumer

The Consumer and/or the Consumer's guardian shall undertake the following:

1. Recruit, interview, hire, train, supervise, schedule and terminate the CDPA..
2. Provide equal employment opportunities as specified in the Consumer's agreement with the CDPAP Provider Agency and the Employment/Wage Agreement which is signed by both the Consumer and the CDPA.
3. Inform the Local Consumer Organization of any changes in status including, but not limited to, address, telephone number, CDPA's names, addresses, hours worked and hospitalization. Inform the social services district of any change in status, including address and telephone number changes and hospitalizations.
4. Process the required paperwork for the CDPAP Provider Agency including time sheets, annual worker health assessments, and required employment documents.
5. Arrange and schedule back up CDPA coverage for vacations, holidays, and in case of illness.
6. Distribute paychecks to each CDPA.
7. Insure that each CDPA works the hours indicated on the time sheet.
8. Meet with a registered nurse once every six months for the required nursing review.

9. Enter into a written agreement with the CDPAP Provider Agency which acknowledges these responsibilities.

Responsibilities of the CDPAP Provider Agency

Upon the completion of the rate approval process by the New York State Department of Social Services, the CDPAP Provider Agency shall undertake the following:

1. Process the payroll for each CDPA, including withholdings for Federal, State and local income tax and Social Security (FICA). Act as the employer of record for Social Security (FICA).
2. Monitor the completion of the required annual worker health assessment and all required employment documents.
3. Act as the employer of record for insurance, unemployment and worker compensation benefits.
4. Coordinate annual leave, health insurance, and other benefit programs for each CDPA.
5. Monitor the completion of the required nursing assessment forms and the Consumer agreement outlining responsibilities assumed thereby.
6. Maintain a personnel record for each CDPA which shall include, at a minimum, copies of the enrollment forms, the annual worker health assessments, and the information needed for payroll processing and benefit administration.
7. Maintain consumer record, which includes copies of the Local Department of Social Service's approval/referral, the Local Department's service authorizations, the agreement signed by the Consumer outlining the responsibilities assumed thereby, the periodic nursing assessments, and other documentation of the Local Consumer Organization's efforts to monitor the Consumer's ability to meet its obligations.

Responsibilities of the Local Department of Social Services

The Local Department of Social Services shall undertake the following:

1. A. Determine that the Consumer is a resident of the authorizing county and is Medicaid eligible.
- B. Determine that the Consumer is eligible for long term care and services provided by a certified home health agency, the long term home health care program, the AIDS home care program or personal care services.
- C. Determine, pursuant to an assessment of the person's appropriateness for the program conducted with an appropriate long term home health care program, certified home health agency, or an AIDS home care program or pursuant to the personal care program, that the Consumer is in need of home care services or private duty nursing.

- D. Determine that the Consumer is able and willing or has a legal guardian able and willing to make informed choices, or has designated a relative or other adult who is able and willing to assist in making informed choices, as to the type and quality of services, including but not limited to nursing care, personal care, transportation and respite services.
2. Determine Consumer's eligibility for the program through its approved annual plan procedure including the initial assessment and periodic reassessments. The Local Social Services Department will authorize the level and amount of services required and will authorize the reimbursement for CDPAP services to the CDPAP Provider Agency as prescribed by the New York State Department of Social Services.
3. Transfer the Consumer to other programs with more traditional agency control should the Consumer be deemed inappropriate to continue participation in the CDPAP.
4. Provide all eligible individuals receiving home care with notice of the availability of the program and an opportunity to apply for participation in the program.
5. Provide Consumers with the appropriate fair hearing notice and the opportunity for a fair hearing with aid-continuing, if appropriate, at such times as the Department requires.

Responsibilities of the Local Consumer Organization

The Local Consumer Organization shall undertake the following:

1. Assist the Consumer with recruitment and service coverage referrals, and provide informational support for training, supervision, advocacy and personal management.
2. Monitor the Consumer's ability to meet contractual obligations.
3. Provide local support to the Consumer by coordinating payroll distribution, the distribution of forms, and the collection of information.
4. Maintain the original personnel record for each CDPA which shall include, at a minimum, the original enrollment forms, the annual CDPA health assessments, and the information needed for payroll processing and benefit administration.
5. Maintain the original Consumer record, which shall include the original Local Social Services Department approval/referral, the Local Social Services Department service authorizations, the agreement signed by the Consumer outlining the responsibilities the Consumer has assumed, the periodic nursing assessments, and other documentation of the Local Consumer Organization's effort to monitor the Consumer's ability to meet its obligations.

6. Coordinate access to health facilities capable of providing the required annual worker health assessment and other health related program requirements.
7. Establish an advisory committee which will consist of disabled consumers, advocates and/or other interested parties. The committee will oversee quality assurance of this agreement and provide the Local Social Services Department and the CDPAP Provider Agency with assistance and support, which may include peer counseling, referral and program monitoring.
8. Provide the CDPAP Provider Agency with monthly statistical reports in the manner and form determined by the CDPAP Provider Agency to be necessary and appropriate, to permit the proper documentation of the growth of the CDPAP and the level of savings achieved as a result of this agreement.

Right to Terminate Agreement

1. Upon thirty (30) days notice, any party may terminate this agreement without further liability.
2. This agreement will terminate upon notification from the New York State Department of Social Services that State and/or Federal funds are unavailable for these services or for any other reason specified by the Department.

Signatures

CDPAP Provider Agency

Date

Local Department of Social Services

Date

Local Consumer Organization

Date

WGIUPD

GENERAL INFORMATION SYSTEM

01/24/03

DIVISION: Office of Medicaid Management

PAGE 1

GIS 03 MA/003

TO: Local District Commissioners, Medicaid Directors

FROM: Betty Rice, Director
Division of Consumer and Local District Relations

SUBJECT: Rodriguez v. Novello

EFFECTIVE DATE: Immediately

CONTACT PERSON: Priscilla Ferry or Gail Phelan @ (518) 474-5271

The purpose of this GIS is to clarify and elaborate on the assessment of Personal Care Services pursuant to the Court's ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies.

Social services districts, including those using locally developed task based assessment (TBA) instruments, must complete a comprehensive assessment of the patient's health care needs in order to determine the patient's appropriateness for services and the amount, frequency and duration of a service authorization. Department regulations (18 N.Y.C.R.R. § 505.14) require both a social and nursing assessment in the Personal Care Services patient assessment process.

The assessment process should evaluate and document when and to what degree the patient requires assistance with personal care services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night. The assessment process should also evaluate the availability of informal supports who may be willing and available to provide assistance with needed tasks and whether the patient's day or nighttime needs can totally or partially be met through the use of efficiencies and specialized medical equipment including, but not limited to, commode, urinal, walker, wheelchair, etc.

When the district, in accordance with 505.14 (a)(4), has determined the patient is appropriate for the Personal Care Services Program, a care plan must be developed that meets the patient's scheduled and unscheduled day and nighttime personal care needs. In determining the appropriate amount of hours to authorize, the district must review the physician's order and the nursing and social assessments to assure that the authorization and scheduling of hours in combination with any informal support contributions, efficiencies and specialized medical equipment, is sufficient to meet the patient's personal care needs.

Social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, social services districts are NOT required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

Completion of accurate and comprehensive assessments are essential to safe and adequate care plan development and appropriate service authorization. Adherence to Department assessments requirements will help assure patient quality of care and district compliance with the administration of the Personal Care Services Program.

WGIUPD

GENERAL INFORMATION SYSTEM

4/27/04

DIVISION: Office of Medicaid Management

PAGE 1

GIS 04 MA/010

TO: Local Commissioners, Medicaid Directors

FROM: Betty Rice, Director
Division of Consumer and Local District Relations

SUBJECT: Consumer Directed Personal Assistance Program
Scope of Services (Revision of GIS 02MA/024)

EFFECTIVE DATE: Immediately

CONTACT PERSON: Christopher Phillips
Bureau of Long Term Care:
(518) 474-6580 or (518) 474-5271

The purpose of this GIS is to clarify the scope of services that an aide in the Consumer Directed Personal Assistance Program ("CDPAP") may provide, particularly with regard to occupational therapy, physical therapy, and speech therapy services.

The scope of services that a CDPAP aide may provide includes all services provided by a personal care services aide, home health aide, registered nurse, or licensed practical nurse. A CDPAP aide is able to provide nursing services because the Education Law specifically exempts CDPAP aides from having to be licensed under Article 139 of the Education Law, otherwise known as the Nurse Practice Act.

The Education Law provisions governing physical therapists (Article 136), occupational therapists (Article 156) and speech therapists (Article 159) do not exempt CDPAP aides from their licensure requirements. CDPAP aides may not perform skilled services that may be performed only by these professionals or any other health care professional subject to the Education Law's licensure provisions. A CDPAP aide may not evaluate the recipient, plan a therapy program, or provide other skilled therapy services unless the aide is also licensed under the appropriate Education Law provision. Any required skilled therapy services must be provided through another source, such as a licensed home care services agency, CHHA, LTHHCP, or a licensed therapist in private practice. Although a CDPAP aide may not provide skilled therapy services directly, an aide may, under the direction of the consumer, assist with the performance of therapy programs that a licensed therapist has planned for that CDPAP recipient.

As stated in GIS 02 MA/024, social services districts' CDPAP assessments and authorizations should continue to include the full scope of home care services that the Medicaid recipient requires and for which he or she, or his self-directing representative, agrees to be responsible under the CDPAP program. A district's CDPAP authorizations must include assistance needed with personal care, home health aide and skilled nursing tasks, and also any physical therapy, occupational therapy, and speech therapy services that the recipient may require and the aide may perform.



STATE OF NEW YORK DEPARTMENT OF HEALTH

Coming Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

LOCAL COMMISSIONERS MEMORANDUM

Transmittal No: 06 OMM/LCM-1

Date: June 30, 2006

Division: Office of Medicaid
Management

TO: Local District Commissioners

SUBJECT: Consumer Directed Personal Assistance Program (CDPAP)

ATTACHMENT: Questions and Answers Related to Administration of the CDPAP

The purpose of this Local Commissioner's Memorandum is to transmit to the local social services districts a compilation of answers to questions submitted by local social services districts, fiscal intermediaries and Consumer Directed Personal Assistance Program (CDPAP) consumers regarding the CDPAP. The Department continues to accept questions regarding administration of CDPAP and will be issuing additional questions and answers in the near future.

In 1996 the legislature passed Social Services Law 365-F establishing the CDPAP to support chronically ill and/or physically disabled individuals receiving home care under the Medical Assistance program greater flexibility and freedom of choice in obtaining such services. CDPAP, is operated in New York State as a Medicaid State Plan service, under the Personal Care Services (PCS) Program benefit.

As such, until discrete regulations governing that program's operations are issued by the Department, the district must follow all applicable PCS assessment and authorization processes and policies. The scope of services that may be authorized under CDPAP include the scope of tasks that may be provided by a Personal Care Aide, Home Health Aide, Licensed Practical Nurse or Registered Professional Nurse.

The attached Questions and Answers document will serve as an additional guide for local districts to use in the administration of the CDPAP. This document will be shared with the CDPAP Association, all fiscal intermediaries and additionally with the New York State Association of Home Care Providers (HCP) and the New York State Home Care Association (HCA). It is strongly recommended that the district discuss the attached document with the

district's Fiscal Intermediary(ies) to assist them in performing the activities identified in the MOU/contract executed between them and the district.

Date: 06/30/06

Trans. No. 06 OMM/LCM-1

Page No. 3

If you have any questions regarding the content of this memorandum or its attachment, you may contact Leslie Galusha or Priscilla Ferry in the Division of Consumer and Local District Relations, Bureau of Long Term Care at 518-474-5271.

Sincerely,

Brian Wing
Deputy Commissioner
Office of Medicaid Management

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

1. **Q.** What is the scope of tasks allowed under the CDPAP?
 - A. Under the CDPAP, the personal assistant's scope of tasks includes only those tasks that may be performed by a personal care aide, home health aide, licensed practical nurse or registered professional nurse. See GIS 04 MA/010, issued April 27, 2004.

2. **Q.** How/When may 24/7 CDPAP services be authorized?
 - A. 24/7 CDPAP services may be authorized when the local district has determined that the consumer meets the criteria for continuous care at 18 NYCRR § 505.14(a)(3). Districts are reminded, however, that Department regulations provide that districts may not authorize or reauthorize personal care services based upon a task-based assessment when the district has determined that the consumer needs 24 hour personal care services, whether continuous (split-shift or multi-shift), 24 hour sleep-in care or the equivalent provided by formal or informal caregivers. See 18 NYCRR § 505.14(b)(5)(v)(d); GIS 01 MA/044 issued 12/24/01; and Q & A #3, herein, for further details.

3. **Q.** Can one person provide 24 hour continuous care?
 - A. No. One person may not provide 24 hour continuous care. In accordance with 18 NYCRR § 505.14(a)(3) "Continuous 24-hour personal care services shall mean the provision of uninterrupted care, by more than one person, for a patient who, because of his/her medical condition and disabilities, requires total assistance with toileting and/or walking and/or transferring and/or feeding at unscheduled times during the day and night." 24 hour personal care includes continuous (split-shift or multi-shift) care provided by more than one aide as indicated in 18 NYCRR § 505.14(a)(3). This is to assure the health and well-being of the consumer whose care needs are being met through this service type. It is unreasonable to assume that a single individual can provide safe and adequate assistance without sleep to a consumer 24 hours per day or that a single person can provide substantial amounts of 7 day/week care.

4. **Q.** May family members be CDPAP providers?
 - A. CDPAP is funded under the Personal Care Services Program (PCSP) benefit in the State's Medicaid Plan. As such, it must operate in accordance with all applicable Federal and State Medicaid statutes and regulations. Personal Care Services regulation 18 NYCRR § 505.14 (h)(2) states that payment for personal care services shall not be made to a consumer's spouse, parent, son, son-in-law, daughter, or daughter-in-law. However, payment may be made to another relative who is not

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

residing in the consumer's home; or, is residing in the consumer's home because the amount of care required by the consumer makes his/her presence necessary.

5. **Q.** Can Medicaid pay for an individual or agency to act as a self directing other for a consumer?
- A.** No. Medicaid reimbursement under the CDPAP is only available for medically necessary tasks and services.
6. **Q.** Should nursing and social assessments be conducted during the period between Medicaid application and determination of Medicaid eligibility and at what point can CDPAP services start?
- A.** If a consumer has filed an application for Medicaid, a social services district may complete an assessment to determine appropriateness of the individual for any MA funded home care services. Services may not be authorized, nor notice provided, however, until such time as MA eligibility has been determined and established.
7. **Q.** May the CDPAP personal assistant physical be waived?
- A.** No. The CDPAP personal assistant must meet the same requirements for health tests, immunizations and examinations that apply to home care services agency personnel who have direct patient contact. The fiscal intermediary must maintain required health documentation in the CDPAP personal assistant's file.
8. **Q.** Can a CDPAP personal assistant perform medical procedures? Is nurse monitoring/supervision of the personal assistant/consumer required?
- A.** The CDPAP personal assistant may perform any personal care aide, home health aide, or nursing task that the consumer has been assessed as needing and has been prior authorized to receive; provided, however, that the personal assistant has been trained to perform the task and is supervised and directed while performing the task. Nurse supervision/monitoring is not required as the determination that the consumer (or his/her self-directing other) has the ability to direct his or her own care and train his/her assistants in needed tasks is made during the assessment process and before the prior authorization of service. Social Services Law § 365-f requires the vendor agency (fiscal intermediary) to monitor the consumer's continuing ability to fulfill his/her responsibilities in CDPAP. The LDSS must ask the fiscal intermediary how it will fulfill that responsibility.

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

- 9 Q. Is there a required number of personal care personal assistants for backup?
- A. No. The need for and number of additional personal assistants is dependent on a variety of factors and should be determined on a case by case basis. A consumer who only has hours authorized for housekeeping tasks is not likely to be at risk if his/her personal assistant is unavailable for a limited period of time. However, a consumer who is ventilator dependent must have an adequate plan for assuring his/her health and safety in the event that the scheduled personal assistant is unavailable. Additionally, if the district determines at any point in time that the consumer's care needs are not being adequately met, the district must review the consumer's arrangements for meeting authorized service and take any appropriate action deemed necessary.
- 10.Q. Are participants receiving Residential Habilitation or Day Habilitation (waiver services) also eligible to receive CDPAP?
- A. It depends. Consumers who receive Residential Habilitation or Day Habilitation services through the OMRDD Home and Community Based Services (HCBS) waiver program may participate in the CDPAP only during those hours of the day in which they are not receiving either of these waiver services. The OMRDD is responsible for personal care services and home health aide services provided to recipients of Residential Habilitation or Day Habilitation services. (See 04 OMM/LCM-3.) Consequently, a consumer may not participate in the CDPAP during those hours of the day in which he or she receives either waiver service through the OMRDD HCBS waiver program; however, the consumer may participate in the CDPAP during those hours of the day in which he or she does not receive either waiver service.
- 11.Q. Can a consumer who participates in CDPAP also receive Meals On Wheels (home delivered meals) and Personal Emergency Response Services (PERS)?
- A. A consumer who participates in CDPAP may also receive Meals On Wheels and/or PERS if the consumer meets the respective eligibility criteria for each service.
- 12.Q. Can a person be hired privately to baby-sit a child and simultaneously take care of a CDPAP consumer during the same hours?
- A. No. MA will only pay for medically necessary services delivered to a consumer and which are specified on a plan of care. It would be impossible to simultaneously provide care to both the consumer and, at the same time, the child.

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

- 13. Q.** How does an individual or an agency become a CDPAP fiscal intermediary?
- A.** The initial step in the process is to contact the local department of social services (LDSS) in order to determine whether or not the LDSS wants to pursue a contract/memorandum of understanding (MOU) with the individual or the agency. If the LDSS determines that they wish to pursue a contract/MOU with the entity, they must follow the guidelines delineated in 98 OCC LCM-003. The agency/individual must contact the Bureau of Long Term Care Reimbursement at (518) 473-8910. A Health Provider Network (HPN) account will be established. The agency/individual will access their HPN and complete the required cost report(s) in order to establish rates. If the agency/individual is not already a Medicaid provider, they must also contact the Division of Medical Review and Provider Enrollment at (518) 474-8161 in order for the Department to establish a provider ID number.
- 14. Q.** Is the CDPAP personal assistant free to choose the vendor agency (fiscal intermediary)? Is the consumer able to choose the vendor agency (fiscal intermediary)?
- A.** Each social services district must contract with a sufficient number of fiscal intermediaries to serve the district's CDPAP consumers. Although neither a CDPAP consumer nor the personal assistant may require that the district contract with a particular fiscal intermediary, districts should be reasonable in the response to requests for a particular fiscal intermediary to be under contract rather than summarily reject such requests across-the-board. There may be circumstances in which the district could reasonably accommodate a request for a particular fiscal intermediary with no detrimental effect on the district's administrative procedures. For example, a CDPAP consumer may request a particular fiscal intermediary because he or she has a long-standing relationship with a personal assistant who is affiliated with that entity. The district should consider whether it can accommodate this or other reasonable requests. Districts should thus evaluate requests for a particular fiscal intermediary to be under contract to the LDSS on a case-by-case basis.
- 15. Q.** CDPAP providers have experienced problems with ePACES. Who should be contacted for assistance?
- A.** Medicaid billing issues and login/systems problems should be directed to Computer Science Corporation (CSC), at 1-800-522-5518 or (518) 447-9860.

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

16.Q. Can annual authorizations be used in CDPAP?

A. If a district is in receipt of Department approval for annual authorization in the PCSP, it may choose to extend that policy to self-directing CDPAP cases. However, because of the nature of CDPAP, the Department recommends that the district carefully evaluate the history of each case on an individual basis to determine if an annual authorization is appropriate. The Department recommends that home visits be made by district staff, or its designee, on CDPAP cases at a minimum every six months to assure that the assistance needs of the individual are being adequately met by the authorized tasks. In cases where the CDPAP participant is not self-directing, annual authorizations should **NOT** be used. It is the Department's policy that, at a minimum, every six month visits by the district staff provide an opportunity to determine the continued involvement of the self-directing other in the assumption of duties related to the oversight of the CDPAP personal assistant.



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

LOCAL COMMISSIONERS MEMORANDUM

Transmittal No: 06 OMM/LCM-02

Date: November 2, 2006

Division: Office of Medicaid
Management

TO: Local District Commissioners

SUBJECT: Consumer Directed Personal Assistance Program (CDPAP)

ATTACHMENT: Second Round of Questions and Answers Related to the Administration of the CDPAP

The purpose of this Local Commissioner's Memorandum is to transmit to the local social services districts, a second round of answers to questions submitted by local social services districts, fiscal intermediaries and Consumer Directed Personal Assistance Program (CDPAP) consumers regarding the CDPAP. The attached Questions and Answers document will serve as an additional guide for local districts to use in the administration of the CDPAP.

This document will be shared with the Consumer Directed Personal Assistance Association of New York State, the New York State Association of Home Care Providers (HCP) and the New York State Home Care Association (HCA). It is strongly recommended that the district discuss the attached document with the district's fiscal intermediary(ies) to assist them in performing the activities identified in the MOU/contract executed between them and the district.

If you have any questions regarding the content of this memorandum or its attachment, you may contact Leslie Galusha or Priscilla Ferry in the Division of Consumer and Local District Relations, Bureau of Long Term Care at 518-474-5271.

Sincerely,

Brian Wing
Deputy Commissioner
Office of Medicaid Management

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

1. Q. Can a legal guardian or "self-directing other" function as a CDPAP personal assistant?
- A. No. A consumer's legal guardian or "self-directing other" may not serve as a CDPAP personal assistant.
2. Q. Describe under what circumstances CDPAP services can be terminated?
- A. A social services district may propose to discontinue a consumer's participation in the CDPAP provided that the district has an appropriate and legitimate reason for its proposed action and sends the consumer a timely and adequate notice of the district's intent to discontinue the consumer's participation in the CDPAP. If the consumer is non self-directing, the district must also send the notice to the consumer's "self-directing other." In the notice, the district must describe the specific reason or reasons why it proposes to terminate the consumer's participation in CDPAP. The consumer is entitled to request a fair hearing and to have CDPAP services continue unchanged (aid-continuing) pending the issuance of the fair hearing decision.

Examples of appropriate reasons (and notice language) for proposing to discontinue services are set forth in the personal care services regulations at 18 NYCRR 505.14(b)(v)(c) and were also attached to GIS 01 MA/044, entitled "Personal Care Services Regulations and Mayer v. Wing," issued December 24, 2001. Other appropriate reasons for proposing to discontinue a consumer's participation in the CDPAP include, but are not limited to, when conditions are known to exist in or around the consumer's home that would imminently threaten the safety of personnel including, but not limited to, actual or likely physical assault which the individual threatening the assault has the ability to carry out; the presence of weapons, criminal activity or contraband material which creates in personnel a reasonable concern for personal safety; continuing severe verbal threats which the individual making the threats has the ability to carry out and which create in personnel a reasonable concern for personal safety; or, the consumer has engaged in fraudulent activities with respect to the Medicaid program. Again, the district must specify in the notice the specific reason or reasons why the district is proposing to discontinue the consumer's participation in the CDPAP, and the consumer has the right to request a fair hearing with aid-continuing.

Prior to sending the timely and adequate notice of proposed discontinuance, the district should counsel the consumer, with the fiscal intermediary (if appropriate), to try to remedy the circumstance that is causing the district to propose discontinuing the consumer's CDPAP participation. Referrals should also be made to Adult Protective Services or to other appropriate available long term care options that may meet the consumer's needs.

Appropriate referrals to the district's fraud unit and the New York State Office of the Medicaid Inspector General should also be made when the district has documented evidence that the consumer, a "self directing other" or a CDPAP personal assistant has engaged in fraudulent activity with respect to the Medicaid program. If the district has documented evidence that the "self-

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

directing other" for a non-self directing consumer has participated in illegal activity, fraud, abuse of the CDPAP personal assistant or consumer or has failed to fulfill his or her responsibilities as the "self-directing" other, the district must intervene on behalf of the non self-directing consumer to assist in rectifying the situation. Consumers who are self-directing should be given the opportunity to select another individual to serve as their "self directing other."

3. Q. What is the responsibility of the Certified Home Health Agency (CHHA) nurse for the CDPAP personal assistant when the consumer also receives home health care services through the CHHA?

A. It is not the responsibility of the CHHA nurse to supervise the CDPAP personal assistant. It is the responsibility of the consumer or "self-directing other" to supervise the personal assistant. It is possible to receive services from both a CHHA and through CDPAP. There should not be a duplication of medically necessary services provided by the CHHA and the personal assistant.

4. Q. What information must the district use in determining CDPAP hours to prior authorize? Do consumers have flexibility on when they can use their weekly authorized hours?

A. Prior authorizations are based on a physician's order and a nursing and social assessment of the consumer's consistent weekly care needs in the home. While the consumer has some discretion in scheduling the provision of care within that weekly authorization, any unused hours of care may not be saved for use at a later time. Continued inability to use authorized hours indicates a need to reevaluate the needs of the consumer.

Some consumers may be concerned that their care needs cannot be met without the ability to "bank" hours. The Department's regulations provide that if a consumer has an unexpected change in his or her social circumstances, mental status or medical condition that would affect the type, amount or frequency of services provided during the authorization period, the social services district is responsible for making necessary changes in the authorization on a timely basis. Local districts currently make changes to existing authorizations based on such unexpected changes.

5. Q. What tasks may a CDPAP personal assistant perform and what are the imitations?

A. The CDPAP personal assistant's tasks include those which may be provided by a personal care aide, home health aide or a nurse:

- ◆ Personal care services tasks include the Level I tasks of assistance with certain nutritional and environmental support functions and the additional Level II tasks of assistance with certain personal care functions. See 18 NYCRR 505.14(a)(6) for a comprehensive listing of tasks.
- ◆ Home health aide tasks include personal care services tasks, as well as, some health related tasks, e.g. preparation of meals for modified or complex modified diets; special skin care; use of medical equipment,

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

supplies and devices; dressing change to stable surface wounds; performance of simple measurements and tests to routinely monitor the medical condition; performance of a maintenance exercise program; and care of an ostomy when the ostomy has reached its normal function.

- ◆ Nursing tasks including, but not limited to, wound care, taking vital signs, administration of medication (including administration of eye drops and injections), intermittent catheterization and bowel regime.

(Also see response to Q. #7)

6. **Q.** May a consumer with an uncontrollable seizure disorder, but no other medical needs, receive CDPAP in case the consumer has a seizure, so the personal assistant could take care of the consumer's baby?
- A.** No. The CDPAP may not be authorized so that a CDPAP personal assistant may care for the consumer's child or other family member. The CDPAP authorization and plan of care are solely for the benefit of the CDPAP participant, not for the benefit of other family members, including children. Services to such family members may be provided through another family member, other informal support or through Title XX.
7. **Q.** Is safety monitoring available in CDPAP?
- A.** Safety monitoring as a discrete task in and of itself, is not an available CDPAP service. Prior authorization of hours for the sole purpose of safety monitoring is not appropriate. Safety monitoring can and should only be provided in CDPAP as part of the personal assistant's performance of medically necessary tasks authorized or listed on the plan of care.

Social services districts should authorize assistance with recognized, medically necessary tasks. As previously advised, (See GIS 03 MA/003 Rodriguez v. Novello, issued January 24, 2003) social services districts are not required to allot time for safety monitoring as a separate task as part of the total hours authorized.

Districts are reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand alone function while no task is being performed, and the authorization of adequate time to allow for the appropriate monitoring of the consumer while providing assistance with the performance of a task, such as transferring, toileting or walking, to assure the task is safely completed.

**CONSUMER DIRECTED PERSONAL ASSISTANCE PROGRAM (CDPAP)
QUESTIONS AND ANSWERS
2006**

8. Q. What is the definition of non-self-directing?

A. As defined in 92 ADM-49, a non-self directing consumer lacks the capability to make choices about the activities of daily living, **does not** understand the implications of these choices, and **does not** assume responsibility for the results of these choices. A non-self-directing individual may exhibit one or more of the following characteristics:

- ◆ May be delusional, disoriented at times, have periods of agitation, or demonstrate other behaviors, which are inconsistent and unpredictable;
- ◆ May have a tendency to wander during the day or night and to endanger his or her physical safety through exposure to hot water, extreme cold, or misuse of equipment or appliances in the home;
- ◆ May not understand what to do in an emergency situation or how to summon emergency assistance; or
- ◆ May not understand the consequences of other harmful behaviors such as, but not limited to, not following medication regimes, refusing to seek assistance in a medical emergency, or leaving gas stoves unattended.

From Dept of Health Web Site;
10 NYCRR – Department of Health Regulations
PART 766: LICENSED HOME CARE SERVICES AGENCIES
10 NYCRR § 766.11

Section 766.11. Personnel.

The governing authority or operator shall ensure for all health care personnel:

(a) the development and implementation of written personnel policies and procedures, which are reviewed at least annually and revised as necessary;

(b) that qualifications for home health aide and personal care aide as specified in section 700.2 of this Title are met;

(c) that the health status of all new personnel is assessed and documented prior to assuming patient care duties. The assessment shall be of sufficient scope that no person shall assume his/her duties unless he/she is free from a health impairment which is of potential risk to the patient or which might interfere with the performance of his/her duties, including the habituation or addiction to depressants, stimulants, narcotics, alcohol or other drugs or substances which may alter the individual's behavior;

(d) that a record of the following tests, examinations or other required documentation is maintained for all personnel who have direct patient contact:

(1) a certificate of immunization against rubella which means:

(i) a document prepared by a physician, physician assistant, specialist assistant, nurse practitioner, licensed midwife or a laboratory possessing a laboratory permit issued pursuant to Part 58 of this Title, demonstrating serologic evidence of rubella antibodies;

(ii) a document indicating one dose of live virus rubella vaccine was administered on or after the age of 12 months, showing the product administered and the date of administration, and prepared by the health practitioner who administered the immunization; or

(iii) a copy of the document described in subparagraph (i) or (ii) of this paragraph which comes from a previous employer or the school which the individual attended as a student;

(2) a certificate of immunization against measles for all personnel born on or after January 1, 1957, which means:

(i) a document prepared by a physician, physician assistant, specialist assistant, nurse practitioner, licensed midwife or a laboratory possessing a laboratory permit issued pursuant to Part 58 of this Title, demonstrating serologic evidence of measles antibodies;

(ii) a document indicating two doses of live virus measles vaccine were administered with the first dose administered on or after the age of 12 months and the second dose administered more than 30 days after the first dose but after 15 months of age showing the product administered and the date of administration, and prepared by the health practitioner who administered the immunization;

(iii) a document indicating a diagnosis of the person as having had measles disease prepared by the physician, physician assistant, specialist assistant, licensed midwife or nurse practitioner who diagnosed the person's measles; or

(iv) a copy of the document described in subparagraph (i), (ii) or (iii) of this paragraph which comes from a previous employer or the school which the person attended as a student;

- (3) a written statement, if applicable, from any licensed physician, physician assistant, specialist assistant, licensed midwife or nurse practitioner, which certifies that immunization with measles and/or rubella vaccine may be detrimental to the person's health. The requirements of paragraphs (1) and (2) of this subdivision relating to measles and/or rubella immunization shall be inapplicable until such immunization is found no longer to be detrimental to such person's health. The nature and duration of the medical exemption must be stated in the individual's personnel record and must be in accordance with generally accepted medical standards (for example, the recommendations of the American Academy of Pediatrics and the Immunization Practices Advisory Committee of the U.S. Department of Health and Human Services);
 - (4) ppd (Mantoux) skin test for tuberculosis prior to assuming patient care duties and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow up but no repeat skin test. The agency shall develop and implement policies regarding follow up of positive test results; and
 - (5) an annual, or more frequent if necessary, health status assessment to assure that all personnel are free from any health impairment that is of potential risk to the patient, family or to employees or that may interfere with the performance of duties;
- (e) that personal identification is produced by each applicant and verified by the agency prior to retention of an applicant by the agency;
- (f)
- (1) that prior to patient contact, employment history from previous employers, if applicable, and recommendations from other persons unrelated to the applicant if not previously employed, are verified; and
 - (2) a criminal history record check to the extent required by Part 402 of this Title.
- (g) that personnel records include verifications of employment history and qualifications for the duties assigned and, as appropriate, signed and dated applications for employment; records of professional licenses and registrations; records of physical examinations and health status assessments; performance evaluations; dates of employment, resignations, dismissals, and other pertinent data provided that all documentation and information pertaining to an employee's medical condition or health status, including such records of physical examinations and health status assessment shall be maintained separate and apart from the non-medical personnel record information and shall be afforded the same confidential treatment given patient medical records under section 766.6 of this Part;
- (h) that time and payment records are kept for all personnel;
- (i) that all personnel receive orientation to the policies and procedures of the home care services agency operation and in-service education necessary to perform his/her responsibilities. At a minimum:
- (1) home health aides must participate in 12 hours of in-service education per year; and
 - (2) personal care aides must participate in 6 hours of in-service education per year;
- (j) that there is a current written job description for each position which delineates responsibilities and specific education and experience requirements; and
- (k) that an annual assessment of the performance and effectiveness of all personnel is conducted including at least one in-home visit to observe performance, if applicable;

(f)

(1) that a program is implemented and enforced for the prevention of circumstances which could result in an employee or patient/client becoming exposed to significant risk body substances which could put them at significant risk of HIV or other blood-borne pathogen infection during the provision of services, as defined in sections 63.1 and 63.9 of this Title. Such a program shall include:

(i) use of scientifically accepted protective barriers during job-related activities which involve, or may involve, exposure to significant risk body substances. Such preventive action shall be taken by the employee with each patient/client and shall constitute an essential element for the prevention of bi-directional spread of HIV or other blood-borne pathogen;

(ii) use of scientifically accepted preventive practices during job-related activities which involve the use of contaminated instruments or equipment which may cause puncture injuries;

(iii) training at the time of employment and yearly staff development programs on the use of protective equipment, preventive practices, and circumstances which represent a significant risk for all employees whose job-related tasks involve, or may involve, exposure to significant risk body substances;

(iv) provision of personal protective equipment for employees which is appropriate to the tasks being performed; and

(v) a system for monitoring preventive programs to assure compliance and safety;

(2) that a policy/procedure is implemented and enforced for the management of individuals who are exposed to significant risk body substances under circumstances which constitute significant risk of transmitting or contracting HIV or other blood-borne pathogen infection. The policy/procedure shall include:

(i) a system for reporting to a designated individual in the agency exposure thought to represent a circumstance which constitutes significant risk of transmitting or contracting HIV or other blood-borne pathogen infection;

(ii) evaluation of the circumstances of a reported exposure and services for providing follow-up of the exposed individual which includes:

(a) medical and epidemiological assessment of the individual who is the source of the exposure, where that individual is known and available;

(b) if indicated epidemiologically, HIV or other blood-borne pathogen counseling and voluntary testing of the source individual. Disclosure of the HIV status of the source individual can be made with the express written consent of the protected individual, or a person authorized pursuant to law to consent to health care for the protected individual if such person lacks capacity to consent, or pursuant to court order, if the HIV status is not known to the exposed individual;

(c) appropriate medical follow-up of the exposed individual; and

(iii) assurances for protection of confidentiality for those involved in reported exposures.

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GENERAL INFORMATION SYSTEM
DIVISION: Office of Long Term Care

9/9/08

PAGE 1

GIS 08 OLTC/005

TO: Local District Commissioners, Medicaid Directors

FROM: Cynthia Schaffhausen, Co-Director
Division of Home & Community Based Services
Office of Long Term Care

SUBJECT: Consumer Directed Personal Assistance Program: Clarification of
06 OMM/LCM-1, "Questions and Answers Related to Administration of
the CDPAP"

EFFECTIVE DATE: Immediately

CONTACT PERSON: Leslie Galusha or Priscilla Ferry at 518-474-5271

The purpose of this GIS is to clarify previous guidance regarding social services districts' administration of the Consumer Directed Personal Assistance Program ("CDPAP") as set forth in 06 OMM/LCM-1, entitled "Questions and Answers Related to Administration of the CDPAP", issued on June 30, 2006. This GIS may have implications in the administration of CDPAP to non self-directing individuals.

In particular, this GIS clarifies the Department's response to Question #8 as it appeared in 06 OMM/LCM-1. This question is set forth below, followed by the Department's response at that time:

- "8. Q. Can a CDPAP personal assistant perform medical procedures? Is nurse monitoring/supervision of the personal assistant/consumer required?
- A. The CDPAP personal assistant may perform any personal care aide, home health aide, or nursing task that the consumer has been assessed as needing and has been prior authorized to receive; **provided, however, that the personal assistant has been trained to perform the task and is supervised and directed while performing the task.** Nurse supervision/monitoring is not required as the determination that the consumer (or his/her self-directing other) has the ability to direct his or her own care and train his/her assistants in needed tasks is made during the assessment process and before the prior authorization of service. Social Services Law § 365-f requires the vendor agency (fiscal intermediary) to monitor the consumer's continuing ability to fulfill his/her responsibilities in the CDPAP. The LDSS must ask the fiscal intermediary how it will fulfill that responsibility." (emphasis added)

This directive clarifies that the Department's response, particularly the bolded language set forth above, should not be interpreted as requiring that, in all cases, the "self-directing other" or surrogate who has voluntarily assumed the responsibility to hire/fire, train, supervise and direct a non self-directing consumer's CDPAP personal assistant be present at all times in the home, or other setting in which services are provided, while the personal assistant performs tasks, whether personal care aide, home health aide or nursing tasks, on the non self-directing consumer's plan of care. The directive also provides further guidance to districts regarding the CDPAP assessment process, particularly with respect to non self-directing consumers.

The district's case manager has the primary responsibility for determining whether the consumer is self-directing and capable of performing CDPAP participant obligations. This determination should be based on a review of available information in the physician's order and the social and nursing assessments. The case manager must be sensitive to the consumer's habits, factors in the consumer's physical environment, and relationships with informal caregivers that may impede the consumer's ability to be self-directing and to consistently perform his or her responsibilities. The case manager should also consult, as needed, with the assessing nurse, the local professional director or designee, or protective services for adults staff. The case manager may also obtain a psychiatric evaluation in appropriate cases.

As defined in Department regulation, a "self-directing" individual is capable of making choices about his or her activities of daily living, understanding the impact of the choice and assuming responsibility for the results of the choice. Characteristics of a self-directing consumer may include the following:

- The consumer is alert, demonstrates unimpaired judgment, makes decisions that do not place the consumer or others at risk and is able to manage his or her own affairs;
- The consumer understands what to do in an emergency that threatens his or her health or safety and can summon appropriate assistance, either verbally or with the help of a device; and
- The consumer knows how to obtain assistance during times when CDPAP services are not being provided, including when services are unexpectedly interrupted due to inclement weather or personal assistant illness.

In contrast to a self-directing individual, an individual who is not self-directing lacks the capability to make choices about his or her activities of daily living, does not understand the implications of these choices, and cannot, or does not, assume responsibility for the results of these choices. Characteristics of a non self-directing consumer may include the following:

- The consumer may be delusional, disoriented at times, have periods of agitation, or demonstrate other behavior that is inconsistent or unpredictable;
- The consumer may have a tendency to wander during the day or night and to endanger his or her physical safety through exposure to hot water, extreme cold or by misusing home appliances or equipment; or
- The consumer may exhibit other behavior harmful to himself or herself or to others, such as hiding medication, taking medication without his or her physician's knowledge, refusing to seek assistance in a medical emergency or leaving cigarettes unattended. The consumer may not understand how to summon assistance in an emergency.

A consumer who is self-directing and who participates in the CDPAP must be capable of hiring/firing, training, supervising and directing his or her personal assistant to perform the particular tasks that are included on the consumer's plan of care. These tasks may include personal care services tasks, home health aide tasks and nursing tasks. The self-directing consumer supervises and directs his or her personal assistant by, among other things, deciding the order and manner in which each specific task identified in the consumer's plan of care is to be performed. Supervision of the personal assistant by a nurse is not required in the CDPAP as training and supervision/direction of the personal assistant is the consumer's responsibility.

A non self-directing individual may be eligible to participate in the CDPAP; provided, however, that an appropriate individual, acting as the consumer's surrogate, is willing, able and available to perform the functions that would otherwise be performed by a self-directing consumer. This requirement is based upon the statute that authorizes the CDPAP for Medicaid recipients. The statute defines an "eligible individual" as including, among other criteria, an individual who "is able and willing or has a legal guardian able and willing to make informed choices or has designated a relative or other adult who is able and willing to assist in making informed choices." [See Social Services Law §365-f(2)(c)] A related statute provides that the CDPAP personal assistant may provide "nursing services" when such services are "under the instruction of a patient or family or household member determined by a registered professional nurse to be self-directing and capable of providing such instructions." [See Education Law § 6908(1)(a) (iii)]

The individual who voluntarily assumes responsibility for performing CDPAP participant functions on behalf of a non self-directing consumer is commonly referred to as the "self-directing other." The individual who serves as the "self directing other" or surrogate for a CDPAP participant should be a legal guardian or a responsible adult acting in a similar fiduciary capacity. This essentially means that the individual owes a duty of care to the CDPAP participant and is expected always to act in his or her best interests. The "self directing other"/surrogate may also be an adult family member, household member or friend whom a registered professional nurse has determined to be self-directing and capable of instructing the personal assistant and performing the CDPAP participant's responsibilities. Neither the fiscal intermediary nor the CDPAP personal assistant may act as the "self-directing other"/surrogate for a CDPAP participant.

The person who serves as the "self-directing other"/surrogate essentially "steps inside the shoes" of the consumer and performs those activities that the consumer would perform, if he or she were self-directing. These activities include hiring and, if necessary, firing personal assistants; training the personal assistant to perform tasks that are included on the consumer's plan of care; scheduling when and how care is to be provided; and, supervising and directing the personal assistant. As the consumer's "self-directing other"/surrogate, this person is also responsible for signing the personal assistant's time sheet, collaborating with the fiscal intermediary in assuring that the consumer remains appropriate for the CDPAP, and participating in the CDPAP assessment process. As with a self-directing consumer, no nursing supervision is needed to determine whether the CDPAP personal assistant is competently and safely performing the tasks included on the consumer's plan of care. This is the responsibility of the "self-directing other" who acts as the consumer's surrogate and who has assumed responsibility for performing all CDPAP consumer responsibilities.

There are various methods by which the "self-directing other"/surrogate may fulfill his or her responsibility to supervise and direct the CDPAP personal assistant to result in a safe plan of care. These include, but are not limited to, continuous or intermittent on-site supervision and direction of the personal assistant; supervision and direction of the personal assistant from a remote site via telephone or other electronic means; or development of an appropriate emergency protocol for the personal assistant to follow should an unexpected change occur in the consumer's medical, mental or environmental condition.

The method that is appropriate depends upon the circumstances of each individual case and is determined by the assessor through discussion with the self directing other during the assessment process. Factors that should be considered include the following:

- whether, based on the consumer's diagnoses, the complexity of the consumer's medical condition, and the specific personal care aide, home health aide or nursing tasks included on the care plan, it is reasonably anticipated that frequent medical or nursing judgment or intervention may be needed to preserve the consumer's health and safety;
- whether, and the extent to which, the consumer, due to age, or physical or mental capacity, is able to communicate his or her needs to the personal assistant;
- whether the "self-directing other"/surrogate who has trained the personal assistant may be able to adequately supervise and direct the assistant from a remote site by telephone or other electronic means; and
- whether the "self-directing other"/surrogate has documented not only the specific tasks with which the consumer needs assistance and that he or she has trained the personal assistant to perform these tasks but also that the assistant has been instructed in what actions to take should a medical emergency occur.

To reiterate, there is **no** requirement that the individual who serves as the "self-directing other" or surrogate for a non self-directing consumer must always be physically present, in each and every case, to supervise and direct the CDPAP personal assistant during the performance of tasks on the non self-directing consumer's plan of care. This individual may fulfill his or her responsibility to supervise and direct the personal assistant by having such contact with the assistant that the district has determined is sufficient to assure, to the extent reasonably possible, a safe care plan. The specific types of contact, whether on-site or via telephone or other means that is appropriate may vary depending upon the specific circumstances of each particular case. The nurse assessor is responsible for developing, in collaboration with the consumer's representative and district case manager, a safe and appropriate plan of care.

The Department has accordingly revised the response to Question #8, as contained in 06 OMM/LCM-1:

"8. Q. Can a CDPAP personal assistant perform medical procedures? Is nurse monitoring/supervision of the personal assistant/consumer required?

- A. The CDPAP personal assistant may perform any personal care aide, home health aide, or nursing task that the consumer has been assessed as needing and has been prior authorized to perform. The consumer, or the person who serves as the consumer's "self-directing other"/surrogate is responsible for training the assistant to perform the tasks and for supervising and directing the assistant. Nursing supervision to monitor a CDPAP personal assistant's ability to perform tasks identified in the consumer's plan of care is not required because supervision and direction of the personal assistant is the responsibility of the self-directing consumer or, in the case of a non self-directing consumer, the "self-directing other"/surrogate. Social Services Law § 365-f requires the vendor agency (fiscal intermediary) to monitor the consumer's, or the self-directing other's, continuing ability to fulfill his or her responsibilities in the CDPAP. The LDSS must ask the fiscal intermediary how it will fulfill that responsibility."